BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GEORGE WHITTELL, JR., AND ELIA WHITTELL)

Appearances:

For Appellants: Richard H. Foster, Attorney at Law

For Respondent: Crawford H. Thomas, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of George Whittell, Jr., and Elia Whittell against proposed assessments of additional personal income tax in the following amounts for the years indicated:

Year	Amount
1940	$ 1,152.81
1941	1,199.38
1942	1,400.00
1943	1,011.36
1944	1,040.00
1945	980.00
1946	611.95
1947	284.87
1948	344.58
1949	932.80
1950	2,240.20
1951	3,741.10
1952	1,433.76
1953	1,705.36
1954	2,722.66
1955	843.48
1956	3,110.05
1957	9,708.46
1958	5,084.14
Total	$39,546.96

In addition, Respondent has proposed penalties of 25 percent of the amounts assessed for each of the years set forth above pursuant to Sections 18681 and 18682 of the Revenue and Taxation

Code. After this appeal was made, Respondent waived the penalties proposed under Section 16662.

Appellants challenge Respondent's action on three points: (1) whether Appellants were residents of California: during any of the years under review, (2) whether gain realized from the sale of certain trees resulted in ordinary income or capital gain, and (3) whether penalties were properly imposed under Section 18681 of the Revenue and Taxation Code.

George Whittell, Jr., hereafter referred to as Appellant, was born in San Francisco in 1661. In 1919 he married his present wife, Elia. He concededly resided in California until 1929. During the period from 1929 until 1936, Appellant rented various living quarters in Reno, Nevada. The amount of time spent in these quarters has not been established. He made large purchases of real property near Lake Tahoe in 1934, 1935 and 1936, eventually owning one-sixth of the lake frontage and one-half of the Nevada side of Lake Tahoe.

Appellant in 1936 built a residence at Crystal Bay, Lake Tahoe, Nevada, at a cost of $300,000. This improvement consists of six houses, a stable, a lighthouse and two boathouses all constructed entirely of stone. These structures and their furnishings were recently insured for $60,000. Appellant occupies this residence when in Nevada,

During the period under review, Appellant rented residential property from the Whittell Realty Company. This property consists of a large two-story residence, six car garage, servants' cottage,. dairy buildings, gatekeeper's lodge, theater and swimming pool, located on fifty acres of land in California near Woodside, San Mateo County. Originally built as a summer residence by Appellant's father in 1909, the income tax returns of the Whittell Realty Company indicate the historical, cost of this property, including land, to be $325,480.21. Appellant paid an annual rental of $9,000.00 for this property. The Woodside improvements and furnishings were recently insured for $100,000. Appellant also maintained an apartment in San Francisco.

Appellant's income is from two main sources - his Nevada property, and stock interests in New York. During the period involved, he received corporate dividends in the total amount of $605,938.00. Total gain reported on the sale of Nevada lands was $965,385.97. Nearly one-half of this latter amount; however, was received in one year, 1957. An internal revenue agent's report relating to Appellant's federal income tax returns, states:

> Taxpayer owns numerous sections of bare land on or near Lake Tahoe. He has never subdivided or advertised any of it for sale. He does not hold a real estate broker's or agent's license nor

> does he have any employee who does so. He has never, as far as can be determined, engaged in any selling activities. Sales of property are made to individuals who approach him, through his attorney, John V. Lewis. As a consequent [sic] of these facts taxpayer is not considered to be in the business of selling real property. Only in 1957 were there several sales of real property, most of them to the State of Nevada under a threat of condemnation. Only occasional sales were in other years.

Appellant is the sole stockholder and president of the Whittell Realty Company, a corporation which owns and manages California real properties, including Appellant's Woodside residence. Appellant states that he has not entered the firm's office in thirty years and conducts all of his business with it by telephone or letter. He received no salary in any of the years under review, except 1957 when he was paid $30,000, and no dividends were declared until 1958 when Appellant received $75,000. The capital and surplus of the Whittell Realty Company rose during the period December 31, 1939 to December 31, 1958 from $2,616,864.39 to $3,939,987.89, a total increase of $1,320,123.50.

Appellant utilized California, Nevada and New York banks. The size of and extent of activity in Appellant's New York accounts is unknown. An affidavit executed October 17, 1960 by the president of the First National Bank of Nevada indicates that Appellant has maintained substantial accounts with that bank which "for some time have been in excess of one million dollars." Appellant had an account in the Anglo California National Bank of San Francisco which, though not particularly active, reached a balance of $982,477.50 in December 1956. He also maintained an account of considerably lesser magnitude with the Market-New Montgomery branch of the Bank of America in San Francisco. A safe deposit box was maintained in the Redwood City branch of the Bank of America.

Appellant has filed his federal income tax returns in the Nevada Internal Revenue District since the early 1930's. These returns were prepared by San Francisco accountants. Appellant has also relied consistently on the professional services of Cali- lawyers, doctors and dentists.

Beginning in the 1930's, Appellant registered his automobiles in Nevada. He has not offered any specific details as to the number of autos so registered each year, the place of principal use of such autos or whether any of his autos were ever registered in California.

Appellant registered to vote in Washoe County, Nevada, in October 1930. His registration was cancelled in one year, 1954, for failure to vote,

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During the years under review, Appellant made gifts in Nevada to the Lake Tahoe Fire Patrol District, the Douglas County Red Cross and the Carson-Tahoe Hospital in amounts ranging from $100.00 to $5,000.00. He also contributed to California charities . Society of California Pioneers, St. Luke's Hospital, and Woodside Fire Department - in unknown amounts. In 1959 he gave 2,500 acres of land to the University of Nevada and he has "set aside the sandy beach area as part of the Nevada State Park System.*'

On July 10, 1942, Appellant received a commission from the Superintendent of Police of the State of Nevada appointing him Superintendent of the Marine Reserve of the Nevada State Police, serving without compensation. Appellant also received an appointment as honorary member of the Nevada State Police for the term of July 2, 1951 to July 1, 1952. On August 28, 1960, Appellant received an honorary Doctor of Laws degree from the University of Nevada.

With respect to his social relationships, Appellant has submitted several affidavits from prominent Nevadans stating that they have known Appellant for several years, that they have been entertained at Appellant's Crystal Bay Home and that they have always considered him a resident of Nevada. With'the single exception of the Menlo Country Club in California, Appellant is not a member of any club in either California or Nevada.

In 1936 Appellant removed an action begun in a California superior court to a federal court on the grounds of diversity of citizenship. The federal court found that Appellant was a citizen of Nevada for the purposes of federal jurisdiction.

In 1940, following some investigation of Appellant's status the then Franchise Tax Commissioner determined that Appellant was not a resident of California. This decision was based upon information supplied by Appellant that he spent only four or five months a year in this State.

In the present proceeding, the Franchise Tax Board has offered a great deal of evidence pertaining to the amount of time Appellant spent in California. This includes affidavits from persons employed by Appellant at his Woodside home, records of newspaper deliveries, and billings for electricity, gas and phone service. It appears that he generally left for the lake in July and returned sometime in October. In 1957, Appellant did not leave California at all due to an injured leg. Without offering any evidence, Appellant concedes that he spent approximately eight months a year in California. We conclude that during the period under appeal, 1940 through 1958, Appellant spent an average of between eight and nine months each year in this State.

During some of the years involved Appellant sold a number of the trees standing on his Nevada land for use as Christmas trees. Gain on the sale of these trees was in the amounts of $10,807.90, $15,462.42, $10,771.60, $8,998.50, $16,875.00 and $12,373.70 for the years 1951, 1952, 1954, 1955, 1956 and 1958, respectively. Appellant did not solicit, advertise, or otherwise actively engage in the sale of these trees. Interested buyers arranged for the purchase through Appellant's attorney and sent crews on to Appellant's land to cut and remove the trees. All trees sold were natural growth and Appellant has not attempted to replant or cultivate new trees..

Appellants have not filed California personal income tax returns for the years 1940 to 1956, inclusive, and 1958. A non-resident return was filed for the year 1957 reporting the $30,000.00 salary paid to Appellant by the Whittell Realty Company as taxable income. The Franchise Tax Board's proposed additional assessments are based primarily on its finding that Appellants were residents of California. Respondent also determined that the income from the sale of Christmas trees was ordinary income, not capital gain. It added 25 percent penalties for failure to file returns.

(1) RESIDENCY

Appellant alleges that in 1929 he went to Reno and then and there formed the intent to become a resident of the State of Nevada, and that since that time he has maintained a definite, positive and continuous intention of making his permanent residence, domicile and abode in that State. He contends that his business, entertainment, social contacts and charitable activities were centered almost exclusively in Nevada. He argues that he personally owned no property in California, that the majority of his income arose from Nevada sources, that he was active in Nevada politics and held "public office" there, that the objects of his bounty were in Nevada, and that he was, therefore, most closely connected with that State. Appellant alleges that he was physically present in California only when inclement weather at Lake Tahoe made it dangerous to his health to remain there. Thus, he argues, he was not a resident of this State within the meaning of the Revenue and Taxation Code.

Section 17013 (now 17014) provides that the term "resident" shall include "Every individual who is in this State for other than a temporary or transitory purpose." This definition is designed to include "all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except individuals who are here temporarily ...." (Cal. Admin. Code, Tit. 18, Regulation 17013-17015(a).) While the underlying theory of the provision is that the state of residence is that state with which the taxpayer has the closest connection,

the crucial question is always whether the person was in California for other than a temporary or transitory purpose. (Cal. Admin. Code, Tit. 18, Regulation 17013-17015(b); Appeal of Tyrus R. Cobb, St. Bd. of Equal., March 26, 1959, 2 CCH Cal. Tax Cas. Par. 201-264, 3 P-H State & Local Tax Serv. Cal. Par. 58156.) Mere formalisms such as changing voting registration or statements to the effect that the taxpayer intended to be a resident of another state cannot control the issue. Whether a person was in California for other than a temporary or transitory purpose must be determined by examining all of the facts, (Appeal of Tyrus R. Cobb, supra.)

Much of Appellant's case rests upon formalisms. Appellant's attempt to emphasize the importance of his Nevada property holdings by deprecating his California interests because they are held in corporate form is as transparent as the registration of motor vehicles and the filing of federal income tax returns in Nevada. While Appellant may have shifted his voting registration to Washoe County, he has offered no proof that he voted there, as a matter of practice, during the years in question. The uncontroverted evidence supplied by the Franchise Tax Board shows that Appellant was usually in California on November election days and would, therefore, have had to vote by absentee ballot.

Appellant has devoted much effort to his attempt to show that he is closely connected with Nevada, while minimizing the significance of the amount of time he spent in California. The time element, however, is one of the most important factors in determining residence. In this case the brevity of Appellant's stays in Nevada considerably detracts from his claim of extensive activities there. If he actually intended to make Nevada his permanent home, and if inclement weather was his only reason for leaving his Crystal Bay retreat, he could easily have found a suitable winter home in one of the milder parts of Nevada rather than spend eight or nine months of each year in California.

Viewing all of the facts, and particularly the pattern followed by Appellant over a span of nearly two decades, that of spending only three or four of the warmest months at Lake Tahoe each year, we are compelled to conclude that he was in California for other than a merely temporary or transitory purpose.

(2) CAPITAL GAIN

The Franchise Tax Board contends that the gains realized from the sale of Christmas trees should be treated as ordinary income on the ground that these trees were held "primarily for sale to customers in the ordinary course of his [Appellant's] trade or business" within the meaning of Section 17711 (now 18161) of the Revenue and Taxation Code).

Section 17711 defines "capital assets" in substantially the same terms as Section 117(a)(l) of the United States Internal Revenue Code of 1939. The criteria employed by federal courts in determining whether property was held primarily for sale to customers in the ordinary course of the taxpayer's trade or business are: the purposes for which the property was acquired, held and sold; whether sales were in furtherance of an occupation of the taxpayer; the proximity of sale to purchase; and the extent of the sales activity on the part of the seller. (Greene-Haldeman, 31 T.C. 1286, aff'd 282 F.2d 884.) A decision must consider all of the facts and no single element, such as the frequency and continuity of sales, is dispositive of the issue. (Goldberg v. Commissioner, 223 F.2d 709; Austin v. Commissioner, 263 F.2d 460; Dairy Queen of Oklahoma, Inc., T.C. Memo., Dkt. No. 48220, March 31, 1959.) Furthermore, it has been said that in order to establish that the taxpayer was engaged in a "trade or business" within the meaning of Section 117(a)(1) there must be an occupational undertaking which required the habitual devotion of time, attention or effort with substantial regularity. (Austin v. Commissioner, supra; Thomas v. Commissioner, 254 F.2d 233, 237; Stern v. United States, 164 F. Supp. 847, aff'd 262 F. 2d 957.)

Respondent points to the fact that Appellant sold trees in six of the last eight years under review and argues that this continuity and regularity is sufficient to constitute a business. We cannot agree. The complete lack of promotional activity or other active participation in the sale and severance of the trees; the established investment purpose of the land on which these trees grew; the length of time such land was held; and the lack of development of this resource, which was merely natural growth sold in its raw state, are factors which weigh heavily in favor of Appellant. We conclude that Appellant's totally passive role in the sale of the Christmas trees did not amount to a trade or business and he is entitled to capital gains treatment of the income therefrom.

(3) PENALTIES

The final issue involves the imposition of penalties pursuant to Section 18681 of the Revenue and Taxation Code (formerly Section 15 of the Personal Income Tax Act). That section imposes a maximum penalty of 25 percent on any taxpayer who fails to file a return required by the applicable code or act on or before the due date of such return, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. Reasonable cause, as used here, has been interpreted under a similar federal statute to mean such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Charles E. Pearsall & Son, 29 B.T.A. 747.)

Appellant urges that he had reasonable cause for not filing California personal income tax returns because it is apparent that he could reasonably have believed that he was a domiciliary and resident of Nevada. Domicile, however, is not the criterion laid down by the Revenue and Taxation Code as the test for residence. We do not think Appellant could reasonably have believed that his purpose for remaining in California eight to nine months of each year was temporary or transitory. Furthermore, we note that Title 18 of the California Administrative Code, Regulation 17013-17015(f) provides that if any question as to an individual's resident status exists, he should file a return in order to avoid penalties, even though he believes he was a nonresident. Reliance may not be placed upon the Franchise Tax Commissioner's prior ruling that Appellant was not a resident in earlier years since the situation here is radically different from the situation described to the Commissioner. No reasonable cause for Appellant's failure to file returns having been shown, we conclude that the penalties were properly imposed.

O R D E R

Pursuant to-the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HLREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of George Whittell, Jr.. and Elia Whittell to proposed assessments of additional personal income tax in the amounts and for the years indicated below, together with penalties totalling 50 percent of the tax, be and the sane is reversed as to its determination that gain from the sale of trees was ordinary income and that 25 percent penalties

were due under Section 18682 of the Revenue and Taxation Code. In all other respects the action of the Franchise Tax Board is sustained.

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1940	$ 1,152.81
1941	1,199.38
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1943	1,011.36
1944	1,040.00
1945	980.00
1946	611.95
1947	284.87
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1949	932.80
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1952	1,433.76
1953	1,705.36
1954	2,722.66
1955	843.48
1956	3,110.05
1957	9,708.46
1958	5,084.14
Total	$39,546.96

Done at Sacramento, California, this 6th day of August, 1962, by the State Board of Equalization.

Geo. R. Reilly, Chairman

Richard Nevins, Member

Paul R. Leake, Member

John W. Lynch, Member

_____, Member

ATTEST: Ronald B. Welch, Acting Secretary